

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	WT Docket No. 05-211
Implementation of the Commercial)	
Spectrum Enhancement Act)	
and Modernization of the Commission's)	
Competitive Bidding Rules and Procedures)	
)	

To: The Commission

COMMENTS OF THE NTCH, INC. dba CLEAR TALK

NTCH, Inc. ("NTCH") hereby submit comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Further Notice of Proposed Rulemaking* ("Notice") seeking comment on whether it should modify its competitive bidding rules ("Part 1" rules) regarding benefits for designated entities (*i.e.*, small businesses, rural telephone companies, and business owned by women and minorities).¹ As a TRUE designated entity, NTCH supports the Commission's efforts to prohibit larger entities from taking advantage of bidding credits meant for DEs if those DEs do not provide access to spectrum for TRUE designated entities. Specifically, NTCH generally supports the prohibition on awarding bidding credits or other small business benefits to entities that are do not fulfill the intent of Section 309(j) requiring the Commission to make available opportunities to small

businesses consistent with the guidelines set forth by the U.S. Small Business Administration.

I. The Commission Should Generally Adopt New Rules for the AWS-1 Auction

The Commission's tentative conclusion that it should modify its Part 1 rules to restrict the award of DE benefits such as bidding credits to an otherwise qualified DE where it has a "material relationship" with a large, in-region incumbent wireless service provider² is consistent with Section 309(j) of the Communications Act of 1934, as amended ("Act").

NTCH believes that the Commission's rules and processes should take into account the fact that a DE could have a "material" relationship with a large carrier, but still have significant and material amount of additional spectrum which could be made available to a TRUE designated entity. For example, a DE with a winning bid for a 20 MHz block in a major market may have the ability to enter into an agreement with an otherwise ineligible large carrier for the use of a portion of its spectrum. While such post-auction leasing arrangements might normally raise issues about the continued qualification of the DE, the Commission could actually use post-auction leases as a way to *foster* its DE policy by offering DE licensees a safe harbor. If a DE leases more than a third of its spectrum to a non-DE, it would nevertheless be presumptively deemed a DE as long as at least an equal amount of the spectrum is operated by one or more TRUE designated entities

² FNPRM at ¶1.

on the remaining spectrum. This would give winners of large geographic spectrum blocks (or very expensive urban spectrum blocks) an incentive to lease portions of that spectrum to TRUE DEs.

II. FCC POLICIES HAVE DISSERVED SMALL BUSINESS, MINORITY, AND WOMEN OWNED ENTERPRISES AND HAMPERED THE DELIVERY OF SERVICES TO THE UNDERSERVED.

Other than for political or influence from the largest carriers, we do not understand why the Designated Entity matter is “separate” docket from the Auction comments. The issue of Designated Entities, and Roaming are integrally related to the holding of any Auction.

In less than six (6) years, the influence of the nation's largest carriers that control 90% of the PCS and cellular spectrum has virtually eliminated minorities, women, and now, under the proposed rule changes, small business despite the congressional mandate to provide these groups opportunities under Section 309(j).

Prior to Auction 22 in 1999, the Commission removed the incentives for women and minority owned business despite the fact that the constitutionality of the matter had never been adjudicated. The rationale was that the small business credits would encompass and provide incentives for women and minorities.

In Auction 35 held in 2001 , the Commission opened up spectrum blocks in the larger markets to large carriers, and for the first time we saw a few of the large national carriers actually bidding with "DE partners" in order to obtain the "small business" discounts.

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Then for Auction 58 in 2005, the largest of the national carriers that did not have "DE partners" decided to join the other national carriers to take advantage of the loopholes that had been created and approved by the FCC after Auction 35.

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As build out requirements or a desire to transfer a license to a non-DE entity began to become an issue in 2000, a new term was coined: "the license save". This was simply another loophole to transfer restricted licenses to the large national carriers, or a way to hold onto a license without providing usable service to the public.

And now, for Auction 66, the rules propose to eliminate restricted blocks completely, after the Commission has concluded set asides are "unnecessary". But what about those of us who have made it work, and are now being abandoned -- companies such as ours that have brought service to rural America and underserved economic groups? True, there are only a handful of smaller companies, pure PCS start ups like ourselves that have

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survived and been profitable: Comscape dba KiwiPCS in North Carolina, Northcoast/Revol PCS in Cleveland OH, Alaska Digital in Alaska, in addition to the more widely known Cricket and Metro PCS. There have been some cellular carriers that were able to expand their service areas by buying new spectrum: Hargray in South Carolina, Corr Wireless in Alabama, Enterprise in Georgia, US Unwired in Louisiana. These all drove the national carriers to improve coverage or enter into arrangements to bring better service to these areas. The companies that have remained independent have more than likely grown beyond the \$15M in average annual revenues required to obtain the highest discount.

These companies and others who have fulfilled the promise on which they made their initial investments should be allowed to qualify for the largest discount available. No matter what the rules are, there will always be new loopholes and new ways for the largest carriers to grab spectrum needed by small companies – the ones who actually innovate and provide services to the underserved, whether it be in rural areas or a socioeconomic group.

Unless the Commission takes action, the large carriers eliminating competition, eliminating access to spectrum through warehousing or effective lobbying, and refusing to enter into reasonable roaming agreements will

ultimately eliminate the small businesses from the telecom landscape. Yet these small businesses are the vehicle by which the Commission intended to provide opportunities to women and minority entrepreneurs. This result cannot be interpreted as the primary intent of any part of section 309(j).

Opponents will argue that providing discounts and opportunities are contrary to other provisions of section 309(j) requiring the Commission to maximize revenues. We disagree. The Commission could maximize the primary source of its revenues while still providing qualified entities ("QE's") with even larger discounts (between 35 and 50%) from the national carriers. This way only spectrum that the larger carriers clearly need will be bid on, thereby eliminating warehousing for anti-competitive reasons.

Qualified Entities should be 1) those carriers previously receiving Designated Entity status in previous auctions without a relationship to a large national carrier who can demonstrate without question to the Commission that they have provided a real service to paying customers on an actual network and continue to independently operate PCS licenses ("exempt"), or 2) new bidders with no relationship to a large national carrier or who qualify under the existing revenue tests.

It is important to note that, because there has been an elimination of the restricted spectrum blocks, a large company faces no real penalty for claiming DE status wrongly. As long as it has a colorable claim, if the Commission later determines that the DE claim was unfounded, the large company will simply have to pay the undiscounted auction price which it really should have owed in the first place. This promotes no-risk gamesmanship and encourages pushing the envelop of DE status through contorted ownership and financing arrangements. Previously the winning bidder faced losing its license if it was deemed to be ineligible. One way to stop or discourage these shenanigans would be to impose a penalty on bidders who are found to have claimed DE status wrongly. The imposition of a 10% penalty on top of the undiscounted bid price would provide strong deterrent to strained or just plain bogus claims to DE status and would reduce the likelihood of the larger carriers abusing the discounts.

We also would not be opposed to all exemptions being subject to final review by the Commission who could reject the exemption if it believed the granting the entity exempt status would not be in the interest of the public or was cleverly designed to unduly obtain discounts.

In summary we request the Commission to consider:

- Increasing the discounts to 35-50% to eliminate spectrum warehousing and maximize revenues from the largest carriers who have the resources and competitive advantage to pay more.
- Eliminating DE fronts: *any* material affiliation to a large national carrier which restricts true small businesses from access to spectrum should result in disqualification as a DE.
- Giving DE auction winners a safe harbor for post-auction spectrum leases to non-DEs as long as at least an equal amount of the spectrum is leased to true DEs.
- Exempting previous DE's as Qualified Entities receiving the largest discount.
- Making the largest discounts available to only those carriers who have not used the advantages of the bankruptcy court to avoid obligations in the past.

Respectfully submitted,

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